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No. 97-1404

In the Supreme Court of the United States

OCTOBER TERM, 1997

LOUIS MALPESO, AKA BOBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether petitioner's right to present a defense was improperly impaired when the district court excluded evidence that it found to be of marginal relevance but potentially highly prejudicial.

2. Whether the district court properly applied the Sentencing Guidelines in sentencing petitioner for conspiracy to murder.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 115 F.3d 155.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1997. A petition for rehearing was denied on October 3, 1997. Pet. App. A30-A31. On December 22, 1997, Justice Ginsburg extended the time within which to file a petition to and including January 31, 1998. The petition was not filed until February 24, 1998, and is therefore out of time. See Pet. 2-3. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of one count of conspiracy to commit murder, two counts of assault with a dangerous weapon, and one count of attempted murder, in each case for the purpose of gaining entrance to or maintaining or increasing his position in an enterprise engaged in racketeering activity, and in each case in violation of 18 U.S.C. 1959(a); two counts of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). He was sentenced to 95 years' imprisonment, to be followed by three years of supervised release, and was ordered to make restitution in the amount of $24,962.35 and to pay a special assessment of $350. The court of appeals affirmed. Pet. App. A1-A29.

1. From mid-1991 to the end of 1994, two rival factions of the Colombo organized crime family fought a "war" for control of the family in New York. Petitioner and his co-defendants Robert Gallagher and Joseph Amato were members of the faction loyal to Victor Orena. The opposing faction was loyal to Carmine Persico, the imprisoned family boss. Pet. App. A3-A4.

In late 1991, petitioner and Pasquale Amato, a "captain" in the Colombo family, devised a plan to murder Persico loyalists Frank Guerra and Anthony Ferrara. Early in the day on December 8, petitioner, Joseph Amato, accomplices Christopher and Anthony Liberatore, and another man drove in three cars to locate and kill Guerra and Ferrara. Petitioner drove

a so-called "safe" car that did not carry any weapons. The "hit team" drove to Ferrara's house, to Guerra's house, to a bagel shop they believed Ferrara and Guerra owned, and finally back to each house. Finding neither intended victim, the team eventually disbanded. Pet. App. A5.

Shortly after returning to his apartment, petitioner learned that his two sons had been shot. Christopher Liberatore testified that petitioner then ordered him to find and shoot Ferrara and Guerra. The two Liberatores twice made the circuit to Ferrara's house, Guerra's house, and the bagel store, finally stopping at the store. Christopher Liberatore went into the store and asked the counter clerk, 17-year-old Matteo Speranza, where Ferrara and Guerra were. Speranza asked why Liberatore was looking for them, and reached under the counter. Liberatore then shot Speranza several times. The Liberatores drove home, abandoned the car, and disposed of the gun used in the shooting. Pet. App. A3, A5-A6.

The Liberatores reported what had happened to petitioner and Joseph Amato, among others. After a private conversation with petitioner and Joseph Amato, Pasquale Amato directed Joseph to hide Christopher Liberatore from the police. Joseph had an associate hide Christopher, and he and Anthony Liberatore then returned to the abandoned car, drove it to an industrial area, wiped it down to remove fingerprints, and removed the ignition to make it appear that the car had been stolen and abandoned. Pet. App. A6.

After the Speranza murder, Christopher Liberatore remained assigned to petitioner, who remained a member of Pasquale Amato's team. Liberatore testified that the team regularly tried to kill members of

the Persico faction. One such incident took place on June 4, 1992. Petitioner, co-defendant Gallagher, Christopher Liberatore, and others drove around looking for Persico loyalists. Petitioner handed Liberatore a gun and stated that if anything happened, Liberatore and Gallagher were to be the "shooters." The group eventually passed a car containing two men, one of whom Gallagher identified as a Persico loyalist. Gallagher began to fire at the car. When the two men ran from their car, Liberatore and Gallagher also got out and continued firing. Daniel Norden, who was sitting on a bench in a nearby park, was hit in the head and nearly died. Pet. App. A7.

2. A grand jury indicted petitioner on conspiracy and other charges. Pet. App. A8-A9. Before trial, the district court ruled that the defendants would not be allowed to introduce evidence that FBI Agent Lindley DeVecchio had leaked information to Gregory Scarpa, Sr., a Persico loyalist and FBI informant. DeVecchio supervised an FBI squad investigating the Colombo and Bonnano crime families. He was also Scarpa's sole contact agent. DeVecchio's fellow agents, including Christopher Favo, eventually became convinced that DeVecchio was leaking information to Scarpa, but they did not immediately reveal this belief to DeVecchio's supervisor. When they did, the allegations led to an internal FBI investigation and a criminal referral to the Public Integrity Section of the Department of Justice. *Id.* at A10-A11; Gov't C.A. Br. 74.

The government asked the district court for an order precluding defense counsel from eliciting testimony concerning the Scarpa/DeVecchio matter or otherwise referring to it before the jury, arguing that the defense sought to introduce that evidence in order

to divert the jury's attention from the defendants' own conduct, to discredit the government, and to seek an acquittal through jury nullification. After reviewing the transcripts of related trials in which the Scarpa/DeVecchio evidence had been admitted, the trial court determined that the evidence was not relevant under Federal Rule of Evidence 401, and that any possible relevance was outweighed by the risk of unfair prejudice under Rule 403. Pet. App. A11-A12.

The jury found petitioner guilty of conspiracy to commit murder, two counts of assault with a dangerous weapon, and one count of attempted murder, in each case for the purpose of gaining entrance to or maintaining or increasing his position in an enterprise engaged in racketeering activity; two counts of using and carrying a firearm in relation to a crime of violence; and one count of being a felon in possession of a firearm. He was acquitted of one count of committing murder for the same purposes and one count of using and carrying a firearm in connection with that offense. Pet. App. A2, A9.[1]

3. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. A1-A29.

The court rejected petitioner's argument that he should have been permitted to introduce the Scarpa/DeVecchio evidence as a basis for arguing that the alleged Colombo "war" was instead "a coup instituted by Scarpa and DeVecchio," and that he did not have the intent necessary to violate 18 U.S.C. 1959 because he acted, not to preserve or increase his position in the Colombo family, but "merely * * * to protect himself." Pet. App. A10-A11. The court agreed with

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[1] Co-defendants Gallagher and Joseph Amato were also convicted of various crimes. Pet. App. A3.

the trial judge that the Scarpa-DeVecchio evidence was "of little or no relevance to the crimes charged in this case." *Id.* at A13. The court noted that evidence of a special relationship between Scarpa and the FBI would "not lead to the conclusion that the Colombo war did not exist," and that petitioner's "self-defense" argument was "contradicted by the lack of evidence that [Scarpa's relationship to the FBI] was commonly known among Orena loyalists." *Ibid.* Moreover, the court observed that admission of evidence concerning the "the tangentially related misdeeds of one government agent" would have "risked needlessly delaying the trial" and "created the very real possibility that the jury would improperly discredit the government's case in reaction to DeVecchio's allegedly gross misconduct." *Ibid.* Thus, the court concluded, "even if the evidence were of some marginal relevance, that relevance [was] far outweighed by the risk of prejudice" for purposes of Federal Rule of Evidence 403, and the district court therefore did not abuse its discretion in excluding the evidence at trial. *Id.* at A11, A13.

The court of appeals also rejected petitioner's claim that his sentence was constitutionally defective because the district court applied the Sentencing Guidelines in accordance with Application Note 5 to Guidelines § 1B1.2(d). Pet. App. A21-A24. That Note provides that if a jury returns a general verdict of guilty on a count charging a multi-object conspiracy, the court should take into account for purposes of sentencing those object offenses that it would have convicted the defendant of conspiring to commit if it

had been sitting as the trier of fact.[2] The court observed that petitioner's conspiracy conviction involved "one crime under one statute—conspiracy to murder, in violation of 18 U.S.C. § 1959(a)(5)." *Id.* at A23. Because there was "no question" that the object of the conspiracy was one or more murders (*ibid.*), the court reasoned, "the proof or lack of proof of any one particular object of the conspiracy [*i.e.*, any particular murder] * * * will have no effect on the verdict as a whole nor on the applicable statutory maximum sentence" (*id.* at A24). Thus, so long as there was sufficient evidence concerning one of the object murders to support the jury's verdict, further determinations concerning which murders were attributable to petitioner were relevant only to sentencing. *Ibid.* Because a sentencing judge would normally make such findings by a preponderance of the evidence, the court concluded, requiring the judge to

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[2] Section 1B1.2(d) provides:

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Application Note 5 explains that "[p]articular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense."

make them under the stricter standard imposed by the Guidelines could not be in error. *Ibid.*[3]

ARGUMENT

1. Petitioner argues principally (Pet. 10-24) that the trial court improperly excluded evidence of the Scarpa/DeVecchio matter, thereby depriving him of the opportunity to present a defense. The court of appeals properly rejected that contention. As that court concluded (Pet. App. A13), the trial court acted well within its discretion in determining that the proffered evidence was "of little or no relevance to the crimes charged in this case." Petitioner contends (see Pet. 17) that the critical issue in the case against him was whether he acted "for the purpose of * * * maintaining or increasing [his] position in" a criminal enterprise (18 U.S.C. 1959(a)). It is difficult to see how evidence that a senior member of the same enterprise was particularly fearsome or dangerous, or that an FBI agent was improperly providing him with confidential information about his rivals in the organization, would have "any tendency to make the existence of [that intent] * * * less probable." Fed. R. Evid. 401. Moreover, as the court of appeals recognized (Pet. App. A13),

> [t]he likely (and presumably intended) effect of admitting evidence of the Scarpa/DeVecchio issue would have been to shift the focus away from the relevant evidence of the defendants' wrongdoing to the tangentially related misdeeds of one government agent. Such a diversion not only

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[3] The court of appeals also addressed and rejected several arguments raised by petitioner's co-defendants. Pet. App. A14-A21, A24-A29.

> risked needlessly delaying the trial, but also created the very real possibility that the jury would improperly discredit the government's case in reaction to DeVecchio's allegedly gross misconduct.

The trial court therefore did not abuse its discretion in concluding that any relevance the Scarpa/DeVecchio evidence might have had was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" (Fed. R. Evid. 403).

There is no merit to petitioner's argument (Pet. 22) that possible prejudice to the government is never relevant under Rule 403 in a criminal case. Petitioner cites the prior decision of the court below in *United States* v. *Aboumoussallem*, 726 F.2d 906, 911-912 (2d Cir. 1984), which observed that "risks of prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense." Neither that case, however, nor *Government of the Virgin Islands* v. *Carino*, 631 F.2d 226, 229-230 (3d Cir. 1980), involved evidence of alleged misconduct by government agents. Compare *United States* v. *Phibbs*, 999 F.2d 1053, 1070 (6th Cir. 1993) (disciplinary investigation of FBI agent), cert. denied, 510 U.S. 1119 (1994); *United States* v. *Peltier*, 585 F.2d 314, 333 (8th Cir. 1978) (evidence that FBI threatened witnesses), cert. denied, 440 U.S. 945 (1979). *Carino*, moreover, relied in its discussion of prejudice (see 631 F.2d at 230) on cases applying Rule 609(a), which explicitly requires the court to balance probative value only against "prejudicial effect *to the accused*" (emphasis added). Cf. *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504

(1989) (discussing Rule 609(a)'s balancing requirement). Rule 403 contains no such textual limitation.

In any event, the risk of "confusion of the issues, or misleading the jury" (Fed. R. Evid. 403) supplied ample justification for the district court's decision to exclude the Scarpa/DeVecchio evidence, even independent of considerations of prejudice. There can be no dispute over the validity of those factors as a basis for exclusion. *Aboumoussallem*, for example, upheld exclusion of the evidence at issue in that case on the ground that the district court had also relied on the possibility of "jury confusion," and the court of appeals was "reluctant to substitute [its] judgment for that of the trial judge." 726 F.2d at 912; see also *Carino*, 631 F.2d at 229-230, citing *United States* v. *Bocra*, 623 F.2d 281, 286 (3d Cir.) (upholding exclusion of proffered defense evidence under Rule 403 because of risk of jury confusion), cert. denied, 449 U.S. 875 (1980); *United States* v. *Stevens*, 935 F.2d 1380, 1406 (3d Cir. 1991) (considering whether defendant's Rule 404(b) evidence "would have distracted the jurors' attention from the real issues in this case" but concluding, on the particular facts involved, that it would not).

Trial courts are properly accorded "wide discretion" in making determinations on the admissibility of evidence (*United States* v. *Abel*, 469 U.S. 45, 54 (1984)), which are generally not to be reversed unless they are "manifestly erroneous" (*General Elec. Co.* v. *Joiner*, 118 S. Ct. 512, 517 (1997)). In this case, the district court carefully considered the proffered evidence and the issues for trial—even reviewing, as the court of appeals noted, the transcripts of other trials in which the evidence had been admitted. Pet. App. A12, A14. The court's fact-bound decision to ex-

clude the evidence was a routine application of basic evidentiary principles, and cannot plausibly be characterized as so "arbitrary or disproportionate" as to raise any question of impingement on petitioner's constitutional right to present a defense. See *United States* v. *Scheffer*, 118 S. Ct. 1261, 1264 (1998).

2. Petitioner also argues (Pet. 24-26) that his sentence was improper because the district court, in applying the Sentencing Guidelines to petitioner's conviction for conspiracy to murder under 18 U.S.C. 1959(a), made its own determination, based on the trial evidence, of which murders petitioner had conspired to commit. That argument is without merit. As the court of appeals pointed out (Pet. App. A23), petitioner's conspiracy conviction was a conviction of "one crime under one statute." Petitioner does not challenge the sufficiency of the evidence to support that conviction. Pet. 5. Nor does he question the court of appeals' observation (Pet. App. A24) that the district court's determination of which particular murders he conspired to commit had "no effect * * * on the applicable statutory maximum sentence" for his offense. See 18 U.S.C. 1959(a)(5) (setting 10-year maximum sentence for "conspiring to commit murder" in violation of Section 1959(a)). Petitioner's challenge to his sentence is therefore based solely on the argument that a district court may not take account of particular conduct, in determining the Guidelines sentencing range for an offense, if the jury, when finding the defendant guilty, might have relied only on conduct that would yield a lower Guidelines range. See Pet. 25. As petitioner effectively concedes (Pet. 26), that claim is foreclosed by this Court's recent decision in *Edwards* v. *United States*, No. 96-8732 (April 28, 1998).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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